TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

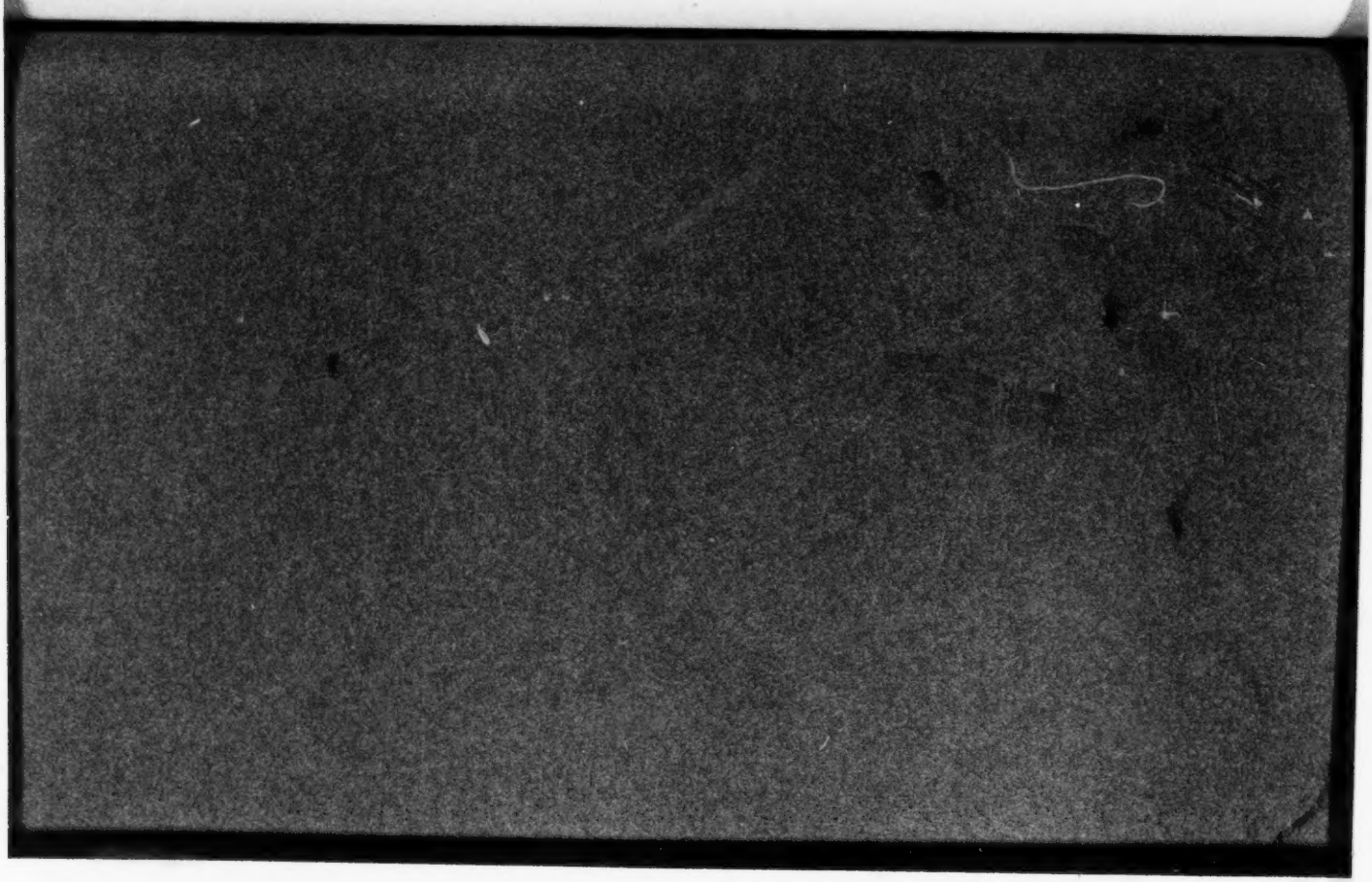
No. 182

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER,

vs.

W. V. N. POWELSON, ADMINISTRATOR, ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. —

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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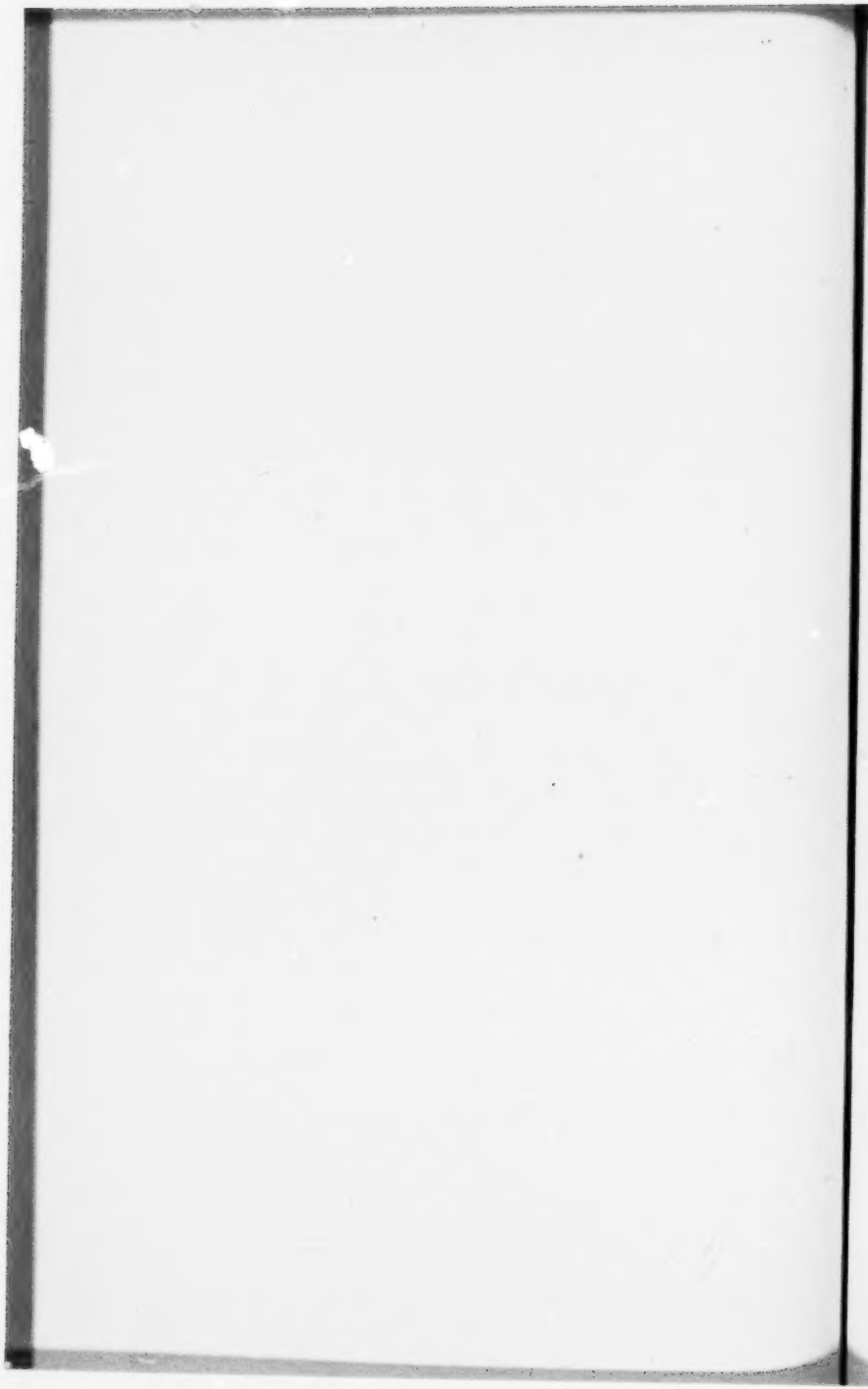


In United States Circuit Court of Appeals, Fourth Circuit

Mandate of the Supreme Court of the United States

Filed July 8, 1943

UNITED STATES OF AMERICA, *ss:*

The PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Fourth Circuit, in a cause between The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Appellant and Cross-appellee, and W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al., Appellee and Cross-appellant, No. 4679, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 10th day of March, A. D. 1941,
2 is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, modified by excluding therefrom the allowance of $100,000 severance damages for the taking of the Murphy plant with interest on that amount; affirmed as to the award of $18,902.02 as damages to the Nottely property, if, within thirty days from the date the mandate is filed in the District Court, the Union Power Company, the subsidiary of the Southern States Power Company, shall make itself a party to the cause in such way as to be bound by the judgment; otherwise it is modified by eliminating therefrom this item of $18,902.02 with interest allowed thereon, as set forth in the opinion of the Court filed herein, and, as so modified, it is affirmed; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Asheville, for further proceedings in accordance with the opinion of this Court; and that each party pay its own costs on the appeals."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-two, the said
3 cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed.

And it is further ordered, that this cause be, and the same is hereby remanded to the said Circuit Court of Appeals for proceedings in conformity with the opinion of this Court.

May 17, 1943

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the seventh day of July, in the year of our Lord one thousand nine hundred and forty-three.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court
of the United States.

September 3, 1943, the original transcript of record and certain volumes of Exhibits are received from the Clerk of the Supreme Court.

In the United States Circuit Court of Appeals for the Fourth Circuit

No. 4679

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

4 W. V. N. POWELSON, RESPONDENT

Notice of motion for final award
Filed Sept. 27, 1943

To: G. LYLE JONES, Esq., and GEORGE H. WRIGHT, Esq., Attorneys for Respondent:

Please take notice that the within motion is being filed with the clerk and will be presented to the Court for consideration at the hearing to be held at Richmond, Virginia, on October 5, 1943.

WILLIAM C. FITTS, JR.,
William C. Fitts, Jr.,
General Counsel,
Attorney for petitioner.

I hereby certify that copies of the above notice, together with the motion referred to therein, have been mailed to G. Lyle Jones, Esq., and George H. Wright, Esq., Asheville, North Carolina, attorneys of record for the respondent, on this September 25, 1943.

WILLIAM C. FITTS, Jr.
William C. Fitts, Jr.

In United States Circuit Court of Appeals

Motion for final award

Filed September 27, 1943

Now comes the petitioner and moves the Court to proceed in accordance with the mandate, and under the authority of section 25 of the Tennessee Valley Authority Act, to fix the value of the property condemned and make a final award in this cause on the record now before the Court.

Respectfully submitted.

WILLIAM C. FITTS, Jr.,
William C. Fitts, Jr.
General Counsel.
CHARLES J. McCARTHY,
Charles J. McCarthy,
ROBERT H. MARQUIS,
Robert H. Marquis,
Attorneys for petitioner.

5 In United States Circuit Court of Appeals, Fourth Circuit

No. 4679

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT AND CROSS-APPELLEE

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL., APPELLEE AND CROSS-APPELLANT

Cross-Appeals From the District Court of the United States for the Western District of North Carolina, at Asheville

Order setting aside judgment of March 10, 1941, and recalling mandate

Filed and entered October 4, 1943

This Court having at its March term, 1941, rendered its decision modifying and, as so modified, affirming the judgment of the said District Court appealed from in this cause, and said cause having been taken to the Supreme Court of the United States by virtue of a writ of certiorari, and the mandate of the said Supreme Court, reversing the judgment of this Court entered in this cause on March 10, 1941, and remanding the cause to this Court for proceedings in conformity with the opinion of the said Supreme Court, having been filed in this Court on July 8, 1943:

Now, in pursuance of said mandate of the Supreme Court of the United States,

It is ordered and adjuged by this court that the judgment entered by this Court, in this cause, on March 10, 1941, be, and the same is hereby, set aside and annulled; that the mandate of
6 this Court, issued and transmitted to the said District Court on May 16, 1941, be, and the same is hereby, recalled; that the Clerk of the said District Court for the Western District of North Carolina return said mandate to the Clerk of this Court forthwith; and that this cause be, and the same is hereby, restored to the docket. October 4th, 1943.

JOHN J. PARKER,
Senior Circuit Judge.

Same day, to wit, October 4, 1943, twenty-five copies of memorandum in support of motion for final award are filed.

In United States Circuit Court of Appeals

Minute entry of argument and submission

October 5, 1943 (October Term, 1943), cause came on to be heard before PARKER, SOPER, and DOBIE, Circuit Judges, and was argued by counsel and submitted.

In United States Circuit Court of Appeals

Amendment to motion for final award

Filed October 8, 1943

Now comes the petitioner and amends the motion for final award previously filed in this Court by adding thereto the following alternative prayers.

1. Petitioner prays that in the event this Court denies petitioner's motion to fix the value of the property condemned and determines instead to remand the cause to the District Court, it will limit said remand to a determinaion of the value of the property condemned on the present record, excluding from consideration any value alleged to result from the adaptability of the property for power or reservoir purposes.

2 In the alternative that, in the event this Court determines
7 to remand the cause to the District Court for the taking of additional evidence, it will in the order of remand limit the additional evidence to be taken to evidence concerning the value of the land condemned without reference to its claimed value for power or reservoir purposes, and will instruct the District Court to exclude the question of value allegedly resulting from the adaptability of the property for power or reservoir purposes from consideration.

Respectfully submitted.

William C. Fitts, Jr.,
William C. Fitts, Jr.,
General Counsel.

Charles J. McCarthy,
Charles J. McCarthy,
Assistant General Counsel.

Robert H. Marquis,
Robert H. Marquis,
Attorneys for Petitioner.

I hereby certify that I have on this 6th day of October 1943, mailed a copy of the above Amendment to Motion for Final Award to G. Lyle Jones, Esq., and George H. Wright, Esq., Asheville, North Carolina, attorneys of record for the respondent.

Robert H. Marquis.
Robert H. Marquis.

Same day, to wit, October 8, 1943, the mandate of this Court issued and transmitted to the District Court on May 16, 1941, is received from the Clerk of the District Court.

8 In United States Circuit Court of Appeals,
Fourth Circuit

No. 4679

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT AND CROSS-APPELLEE

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL., APPELLEE AND CROSS-APPELLANT

Cross-Appeals from the District Court of the United States for the Western District of North Carolina, at Asheville

(Argued October 5, 1943. Decided October 8, 1943)

Before PARKER, SOPER, and DOBIE, Circuit Judges

William C. Fitts, Jr., General Counsel, Tennessee Valley Authority (Charles J. McCarthy, Assistant General Counsel, Tennessee Valley Authority, and Robert H. Marquis on brief) for Appellant and Cross-Appellee, and G. Lyle Jones and George H. Wright for Appellee and Cross-Appellant.

Opinion

Filed October 8, 1943

9 PARKER, Circuit Judge:

The decision of this Court, rendered on March 10, 1941, was to the effect that the award of damages by the District Court for property condemned by the United States should be modified by eliminating certain items from the award of damages and that, as so modified, the judgment appealed from should be affirmed. United States v. Powelson, 4 Cir. 118 F. 2d 79. This decision was reversed by the Supreme Court because that Court was of the view that in arriving at the award of damages certain elements had been included in the valuation of the property which should not have been considered. United States v. Powelson, — U. S. —, 63 S. Ct. 1047, 1057. We have given careful consideration to what should be the future procedure in the case, and are of the opinion that it should be remanded to the District Court for further proceedings in accordance with the principles laid down by the

Supreme Court, and with leave to the parties to produce additional testimony, if they so desire.

In reversing the decision of this Court, the Supreme Court held that the respondent's privilege to use the power of eminent domain might not be considered in determining whether there was a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future, and that respondent had not established the basis for proof of the "water power value" which was asserted, except upon the assumption that it possessed the power of eminent domain. The limited nature of the decision was shown by the opening sentence of the next to the last paragraph of the opinion wherein the Court said:

"We hold only that profits, attributable to the enter-
10 prise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken."

The Court went on to say:

"Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules (United States v. Miller, supra)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain."

The Miller case cited in the excerpt from the opinion goes fully into the principles to be applied in determining valuation and states that "the market value of the property is to be fixed with due consideration of all its available uses," citing Boom Co. v. Patterson, 98 U. S. 403, 408. The rule is thus stated in the case last cited:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate
11 a rule to govern its appraisement in all cases. Exceptional

circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

Nothing said by the Supreme Court changes in any way the rule as to damages laid down in Olson v. United States, 292 U. S. 246, 256, from which we quoted in our opinion as follows:

"The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. (Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. Ed. 2-6; Clark's Ferry Bridge Co. v. Public Service Comm., 291 U. S. 227, 54 S. Ct. 427, 78 L. Ed. 767; 2 Lewis, Eminent Domain, 3d Ed. Sec. 707, p. 1233; 1 Nichols, Eminent Domain, 2d Ed. Sec. 220, p. 671). The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service (New York v. Sage, 239 U. S. 57, 61, 36 S. Ct. 25, 60 L. Ed. 143). It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites, and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account" (Mississippi & R. River Boom Co. v. Patterson, ubi supra).

The difficulty presented by the record in this case is that the evidence of value produced by the owner was based almost entirely on profits of the enterprise which he hoped to launch, whereas the evidence on the other side consisted almost entirely of the opinions of those who valued the land merely as wild mountain land without reference to any value it might have because of its availability as a power site. Opinions of persons knowing nothing of the value of land for water power purposes are not a fair criterion of its value, where there is evidence that it is available for such purposes. Persons in the immediate neighborhood may not be in position to testify as to such value, but there may be others who are qualified to testify. Certainly one

who has embarked upon the enterprise of a great water power development, has purchased and brought together thousands of acres of land for the purpose and spent hundreds of thousands of dollars in the enterprise, is entitled to have his holdings valued on some other basis than that of numerous small separated tracts of wild mountain land, if it be found, irrespective of the possession of the power of eminent domain by the landowner, that "there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future." Market value is nothing but a hypothetical concept based upon what, in the opinion of those who know, a willing buyer would have to pay a willing seller of property in order to purchase it. The question here is, not what wild mountain land was selling for in the community, but what would the portion of land owned by Powelson and available for this water power development have been reasonably worth on the market
13 when sold by one who was willing but not compelled to sell and bought by one who was willing but not compelled to buy. In arriving at this valuation, it is proper that those who make it take into consideration the fact that a large body of land has been brought together under one ownership and any special value that it may have acquired because of this fact.

If the parties desire to adduce additional evidence on this question in the light of the Supreme Court's decision, they should be allowed to do so. If they do not so desire, the valuation should at all events be made in the first instance by the court below, because of the opportunity which the judges and commissioners of that court have had to view the land and hear the witnesses as to valuation testify. The judgment below will accordingly be reversed and the case will be remanded to the District Court for further proceedings not inconsistent herewith.

14 In United States Circuit Court of Appeals,
Fourth Circuit

No. 4679

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT AND CROSS-APPELLEE

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL., APPELLEE AND CROSS-APPELLANT

Cross-Appeals from the District Court of the United States for the Western District of North Carolina

Judgment

Filed and Entered October 8, 1943

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Asheville, for further proceedings not inconsistent with the opinion of the Court filed herein; and that each party pay its own costs on the appeals.

October 8, 1943.

JOHN J. PARKER,
Senior Circuit Judge.

October 11, 1943, Petition of Appellant and Cross-Appellee for a stay of mandate filed.

In United States Circuit Court of Appeals

Order staying mandate

Filed and Entered October 11, 1943

Upon the application of the appellant and cross-appellee, by its counsel William C. Fitts, Jr., Charles J. McCarthy, and Robert H. Marquis, Esquires, and for good cause shown:

It is ordered by this Court that the mandate of this Court in the above-entitled cause be, and the same is hereby, stayed pending petition of the appellant and cross-appellee in the Supreme Court of the United States for a writ of mandamus and prohibition, unless otherwise ordered by this or the said Supreme Court, provided said petition for a writ of mandamus and prohibition be filed in the said Supreme Court within two weeks of this date.

October 11, 1943.

JOHN J. PARKER,
Senior Circuit Judge.

October 14, 1943, the appearance of G. H. Wright is entered for the Appellee and Cross-Appellant.

In United States Circuit Court of Appeals

Order authorizing clerk to use original transcripts of records in making up records for use in the Supreme Court of the United States on application for writs of certiorari

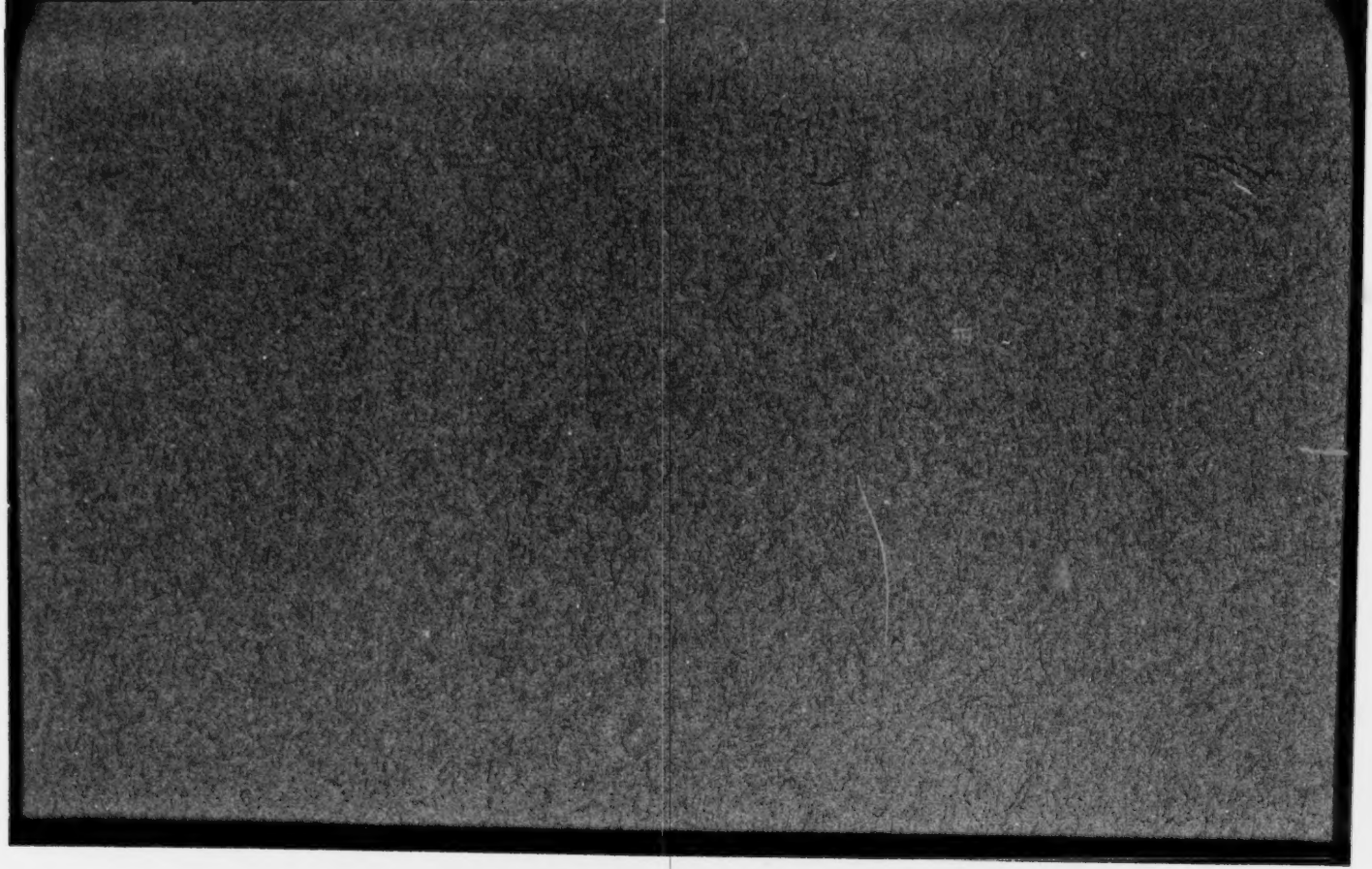
For reasons appearing to the Court, it is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed
16 of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records, January 9th, 1941.

JOHN J. PARKER,
Senior Circuit Judge.

17 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1944



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CITATIONS

565873—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. ——

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, acting upon the relation and for the use of the Tennessee Valley Authority, prays that a writ of certiorari issue to review the order of October 8, 1943, of the United States Circuit Court of Appeals for the Fourth Circuit remanding the case to the District Court of the United States for the Western District of North Carolina, with instructions to permit the respondent to introduce additional evidence as to the alleged value for power purposes of lands of the respondent condemned by the petitioner.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 6–9) is not yet reported.

JURISDICTION

The order of the circuit court of appeals sought to be reviewed was entered on October 8, 1943. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after this Court has ruled that respondent is not entitled to compensation for any alleged water-power value with respect to lands condemned, the Circuit Court of Appeals has authority to remand the cause to the District Court for a new trial, with permission to receive evidence on the issue of water-power value and to include the final award an allowance for said water-power value.

2. Whether, if it be determined that the issue of water-power value has not been removed from this case by the prior decision of this Court, such value should be excluded upon the principles of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

STATUTE INVOLVED

The appendix, *infra*, pages 14–17, contains the applicable provisions of the Tennessee Valley Authority Act of 1933.

STATEMENT

On January 28, 1936, the United States, on behalf of the Tennessee Valley Authority, filed a petition in the United States District Court for the Western District of North Carolina to condemn certain lands in and adjacent to the Hiwassee River, a major tributary of the Tennessee River.

In accordance with the procedure prescribed by section 25 of the Tennessee Valley Authority Act, evidence concerning the value of the land condemned was heard, and an award was made by three commissioners appointed by the District Court. Cross-appeals were taken from this award to a three-judge district court, which heard additional evidence and made a revised award. Cross-appeals were taken from the decision of the district court to the United States Circuit Court of Appeals for the Fourth Circuit, which, after hearing argument, entered judgment affirming, with modifications, the decision of the district court.

Thereafter, petitioner sought, and on October 13, 1941, this Court granted, a writ of certiorari to review the judgment of the Circuit Court of Appeals. The case was docketed in this Court as *United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Petitioner* v. *W. V. N. Powelson, Assignee and Successor in Interest of Southern*

States Power Company, a Corporation, et al., October Term, 1941, No. 500, and was argued before this Court on March 12, 1942. It was subsequently restored to the docket, October Term, 1942, No. 3, and reargued on March 1, 1943.

The basic issue presented in this Court was whether the inclusion of water-power value in respondent's award was proper. On May 17, 1943, this Court rendered its decision, holding that water-power value should not have been included in respondent's award and remanding the cause to the Circuit Court of Appeals for further proceedings not inconsistent with this Court's opinion. On July 8, 1943, this Court's mandate was issued, directed to the United States Circuit Court of Appeals for the Fourth Circuit (R. 1–2).

On October 5, 1943, petitioner moved the Circuit Court of Appeals to proceed, in accordance with the mandate of this Court and under the authority of section 25 of the Tennessee Valley Authority Act, to fix the value of the property condemned without reference to its alleged value for power or reservoir purposes. On October 8, 1943, the court denied petitioner's motion and entered an order remanding the cause to the District Court for the taking of additional evidence, including evidence relating to the value of the land condemned for water-power purposes, and the making of a new award including water-power value (R. 6–10).

On November 15, 1943, petitioner filed with this Court a motion for leave to file a petition for writ of mandamus requiring the Circuit Court of Appeals to vacate and cancel its order of October 8, 1943, and commanding it either to proceed to fix the value of the property condemned without reference to its alleged value for power or reservoir purposes or to remand the cause to the District Court under a mandate instructing that court to proceed to make an award fixing the value of the property without reference to such alleged power and reservoir value. In the alternative, petitioner asked that a writ of prohibition issue prohibiting the Circuit Court of Appeals from remanding the cause to the District Court (a) for the taking of any additional evidence whatsoever or, (b) in the alternative, for the taking of any evidence relating to the alleged value of the land condemned for power or reservoir purposes. This motion was denied on December 6, 1943, without prejudice to petitioner's right to petition for a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In remanding the cause to the district court for the taking of any additional evidence whatsoever.

2. In remanding the cause to the district court for the taking of any evidence relating to the

alleged value of the land condemned for power or reservoir purposes.

3. In remanding the cause to the district court for the making of a new award including the claimed water-power value.

4. In failing and refusing to construe the opinion of this Court as a holding that respondent was not entitled to an allowance for water-power value.

5. In failing and refusing to construe the opinion of this Court as holding that the chances of combining respondent's lands into a project without the exercise of the power of eminent domain were too remote to have any legitimate effect upon the valuation of the property.

6. In construing the opinion of this Court as not holding that the question of allowance for water-power value has been finally determined against the respondent.

7. In holding that respondent is entitled to a valuation of his land which will include an allowance for water-power value.

REASONS FOR GRANTING THE WRIT

1. The order of the court below is contrary to the decision of this Court announced on May 17, 1943 (*United States ex rel. Tennessee Valley Authority* v. *Powelson,* 319 U. S. 266), and the mandate which was issued on July 7, 1943.

The ultimate issue involved is the fair market value of the land condemned by the Government. That question was litigated on its merits through the courts below. The respondent obtained an award based upon the alleged water-power value of the land. The Government contended that the award was erroneous and that no award including any allowance for such water-power value could be sustained. Certiorari was granted and the issue determined by this Court.

The basic question presented to this Court was whether the respondent was entitled to an award based upon the alleged value of the land for water-power purposes. As we construe the Court's opinion, it decides this issue adversely to respondent. In its opinion this Court defined the issue that it was undertaking to determine as follows:

> Sec. 25 of the Act authorizes awards covering "the value of the lands sought to be condemned." The storm center of this controversy is whether water power value may be included in respondent's award [319 U. S. at 273].

It then proceeded to decide that question:

> * * * For if we assume, without deciding, that rights in the "flow" of a non-navigable stream created by local law are property for which the United States must pay compensation when it condemns the lands of the riparian owner, *the water power value*

> *which respondent sought to establish cannot be allowed* [*ibid.;* italics supplied].
>
> * * * * *
>
> The result is that respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. If the power of eminent domain *be left out of account, the chances of making the combination appear to be too remote and slim "to have any legitimate effect upon the valuation." McGovern* v. *New York, supra* [229 U. S.], p. 372. *Respondent therefore has not established the basis for proof of the water power value which was asserted* [*id.* at 285; emphasis supplied].

The reach of the decision was recognized in the dissenting opinion filed by Mr. Justice Jackson, who stated:

> The Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter and I understand the Court to hold that property physically adaptable to power purposes, taken by the Federal Government for power purposes among others, is to be valued as worthless for power purposes as matter of law because its projected development might be defeated if the State should revoke the power of eminent domain admittedly possessed by the owner at the time of the taking. * * *
>
> * * * * *

> * * * By thus cancelling for the purpose the power of eminent domain, it holds as a matter of law that the project was not feasible to execute and that the lands assembled for power purposes, admittedly physically adaptable to the use and taken by the Government for that purpose, have no power utilization value [*id.* at 286, 288–289].

Were the language of the opinions less explicit, it would still be clear that the question of the right to water-power value has been necessarily foreclosed by the decision. The contention advanced by the Government in this Court that the award could not, as a matter of law, include any allowance for the claimed water-power value was based on several distinct grounds:

(a) That under *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, a landowner is not entitled to compensation based upon the availability of his land for power purposes where such availability depends upon the right of the owner to appropriate for his own use the flow of a stream over which the United States has absolute control, and that although the Hiwassee River is nonnavigable at the site of the land condemned, the flow at that point has such a direct and immediate effect upon the federal interest in navigation and flood control and on the admittedly navigable portion of the stream as to vest in the United States the same plenary control over both the navigable and nonnavigable portions of the river.

(b) That the competent proof established conclusively that the property had no value for power purposes; the only proof offered by respondent to establish such value consisted of estimates of value based on the capitalization of predicted future profits from respondent's hypothetical development, and such proof should not have been considered.

(c) That the possible future exercise of the power of eminent domain by the respondent could not be taken into account in determining whether there was a reasonable probability that the land condemned would have been developed or marketed for power purposes in the reasonably near future and that, without the exercise of the power of eminent domain, no such probability existed.

This Court decided that the award could not legally include any allowance for water-power value upon the last of these grounds. It held, first, that in determining whether there was any reasonable probability that this land could be marketed for power purposes to anyone other than the Government, the possible future use of the power of eminent domain must be left out of consideration; and second, that when such possibility is excluded, the prospect of development for power purposes becomes too remote to be included in market value.

Having thus removed from the case the whole question of water-power value, this Court found it unnecessary to pass upon the Government's

other contentions. No award including any allowance for water-power value could be sustained unless this Court decided against the Government's contention that the rule of the *Chandler-Dunbar* case is applicable under the circumstances presented here. That issue could be left undetermined only because this Court decided upon independent grounds that, as a matter of law, the final award could not include such water-power value. It could not have been intended that this case be relitigated through the courts *on the issue of water-power value* with the basic question of the nature of respondent's interest in the water power still to be determined. Yet that is the situation created by the order to remand issued by the Circuit Court of Appeals. Under that order, as amplified by the opinion, the District Court is free to render a final award based on water-power value, in which event the question which this Court found it unnecessary to decide, i. e., the existence of private property rights to develop and appropriate the flow of the Hiwassee River, arises again for determination.

2. The decision below is in conflict with the principles announced by this Court in *In re Potts,* 166 U. S. 263; *Gaines* v. *Rugg,* 148 U. S. 228; *Ex parte Dubuque & Pacific R. R.,* 1 Wall. 69; *Sibbald* v. *United States,* 12 Pet. 488; and *Tyler* v. *Magwire,* 17 Wall. 253. These cases hold that where the merits of a case have once been decided

by this Court, the Circuit Court of Appeals has no authority to grant a new trial or a rehearing or to permit the introduction of additional evidence without express leave of this Court.

3. The decision below is in conflict with *Merchants' Banking Co.* v. *Cargo of the Afton,* 134 Fed. 727 (C. C. A. 2d), certiorari denied, 196 U. S. 639; *In re Mifflin Chemical Corp.,* 123 F. (2d) 311 (C. C. A. 3d), certiorari denied, *sub nom. Sheridan* v. *Rothensies,* 315 U. S. 815; and *Bassick Mfg. Co.* v. *Adams Grease Gun Corp.,* 54 F. (2d) 285 (C. C. A. 2d), certiorari granted, 285 U. S. 531, certiorari dismissed, 286 U. S. 567, in holding that a litigant who has tried his case on the theory of his own choice should be permitted an opportunity to relitigate after a final decision on the merits. For the same reason the decision below is also in substantial conflict with the decision of this Court in *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399.

4. If the Court should conclude that its previous decision has not disposed of the question whether water-power value may be included as an element of compensation, we here renew our contentions based upon *United States* v. *Chandler-Dunbar Co, supra; United States* v. *Appalachian Power Co.,* 311 U. S. 377; *Oklahoma ex rel. Phillips* v. *Atkinson Co.,* 313 U. S. 508; and *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690. If that issue is still open, we think that the order of the

court below is in substantial conflict with the principles established in those cases.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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